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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ARTURO JIMENEZ, Defendant and Appellant.	B201906 (Los Angeles County Super. Ct. No. BA275902)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Arturo Jimenez appeals from his conviction of the first degree murder of Gary Rivera, with an enhancement for personal use of a firearm. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).)[1] He argues that the evidence is legally insufficient to establish the identity of the perpetrator of the offense and to establish premeditation. In a related argument, he contends the trial court erred by denying his motion for a new trial on the ground that the guilty verdict was contrary to the weight of the evidence. He also contends the trial court committed a number of other reversible errors: failing to instruct the jury on unreasonable self-defense and heat of passion voluntary manslaughter; admitting evidence that appellant's associates had threatened a key prosecution witness; admitting a video recording of the party at which the crime occurred; and denying a new trial on the ground of juror misconduct without holding an evidentiary hearing. Finally, he challenges the mandatory firearm enhancement to his sentence as unconstitutional cruel and unusual punishment.

We find no prejudicial error, and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On the night of September 25, 2004, Gary Rivera and Jairo Gomez were fatally shot during a fight at a party attended by hundreds of young people. Appellant was later identified as the shooter by a single eyewitness, and charged with both murders. After a jury trial, appellant was convicted of the willful, deliberate, and premeditated murder of Gary Rivera. The jury could not reach a verdict on the murder of Jairo Gomez, and the trial court declared a mistrial as to that count. Because of appellant's challenge to the sufficiency of the evidence, we describe in detail the evidence elicited at trial regarding the location where the shooting took place, the parties involved, and the credibility of the eyewitness.

The shooting took place at a "flier party" in a building on Spring Street in downtown Los Angeles. A flier party is advertised by means of fliers that provide a date for a party, but no location. On the fliers is a phone number that interested partygoers

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

can call shortly before the party is to begin in order to learn where it will be held. Flier parties generally are sponsored and attended by "party crews." These are groups of friends that can range in size from three or four up to a hundred people. Different party crews may consider themselves affiliated with one another and may work together to sponsor parties. The prosecution introduced evidence that appellant was a member of "Doggy Style" party crew and that he was often identified by the nickname "Expo."

On September 25, Rivera and Gomez went to the party with Gomez's cousin, Jiovanny Arevalo, and a friend named Rigoberto Robleto. At the party, they met up with Rivera's sister, Jacqueline Rivera,[2] and her boyfriend, Cristian Montoya. Arevalo, Robleto, Jacqueline, and Montoya all testified at the trial. None of them testified to being acquainted with appellant or to seeing him at the party.

Arevalo testified that after arriving at the party, he left Rivera and Gomez, and went looking for a young woman to dance with. Arevalo approached a young woman and asked her to dance. According to his testimony, the next thing that happened was, "A guy just went up in my face, like, quickly, so I pushed him away from me, and he socked me in the face. That's when I took off for him. I socked him back, and then that's when I felt another sock behind my back. So I turned around, and I started chasing the other guy, and then, I don't know, I was getting socked left and right, so I fell on the ground, and I was just covering myself. They were stomping me for about 15, 20 seconds." Arevalo could not describe his attackers. He was briefly unconscious during the beating, and he did not know whether Rivera and Gomez had attempted to come to his aid.

Robleto testified that he saw an argument begin between Arevalo and an unidentified man, then saw a crowd begin to gather around them. Fistfights broke out, and more people began to get involved in the altercation, including Gomez. Robleto then heard gunshots. He was not sure how long the fight had been going on when the shots were fired. Although he could not identify the shooter, he saw the flash of the gun in a

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[2] Because this witness shares the same last name as the victim, we refer to her as Jacqueline.

crowd of people some 22 or 23 feet away. After hearing two or three gunshots, there was a pause, then Robleto heard a couple more shots. He did not see the flashes from the second set of shots.

Jacqueline was in a different part of the room when the fight broke out. She was unaware of the fight until she heard gunshots. After hearing a couple of shots, she saw Rivera walk toward her. He lifted up his shirt and showed her that he had been shot. He then walked back toward the fight and threw a bottle at someone. Jacqueline described the fight at this point as "a rumble" with "a lot of people." Jacqueline briefly lost sight of Rivera, because the room was dark and crowded. About a minute later, Jacqueline heard a second set of gunshots. Around this time, she found Rivera. She saw him stepping backwards, then saw a flash that she believed to be a gun being fired. She could not estimate the distance between Rivera and the flash. By the time Jacqueline got to Rivera, he had collapsed by the door.

Montoya was smoking marijuana at the party when he heard a gunshot. He turned around and saw the flash of another gunshot about 20 feet away. Montoya told police that the flash appeared to come from a person with shoulder length, curly hair in a ponytail standing with several other people. Almost simultaneously, he saw Rivera grab his side; Rivera also was about 20 feet away. Montoya pushed Jacqueline away and told her to duck, then Rivera came up and said he had been shot. Rivera reached into his jacket and pulled out a bottle, then ran back into the crowd. Montoya followed Rivera. Someone hit Montoya on the back of the head and he got into a fist fight. While he was fighting, he heard more shots, but he could not tell how long he had been fighting before he heard them or how far away they were. After he broke away from the fight, he saw Rivera on the floor with Jacqueline beside him. Montoya went to them. Rivera seemed to be unconscious.

No one testified to seeing Gomez get shot.

A police officer, who was standing outside the building where the party was being held, testified that he heard gunshots around 11:00 p.m. After the gunshots, he heard people inside the building begin to beat on a window in the south wall, near where he was

standing. Between 15 and 30 seconds after the last gunshot, the window shattered, and partygoers began streaming out the window. Partygoers also exited through doors in the front and the rear of the building.

Police at the scene found a shooting victim, identified as Gomez, inside the room where the party was held, beside the broken window. Another victim, identified as Rivera, was found near a door in the same room, about 40 feet away. Both victims died as a result of gunshot wounds. Gomez suffered a single gunshot wound to the chest, from which the bullet was recovered. Rivera suffered a wound to the chest and a wound to the back, either of which would be fatal. Both of these bullets were recovered from Rivera's body. He also suffered nonfatal wounds in the abdomen and thigh. The bullets causing the nonfatal wounds exited the body and apparently were not recovered. An expert witness for the prosecution opined that all three recovered bullets—one from Gomez and two from Rivera—were fired from the same .32-caliber firearm.

Eric Rodriguez was the only person to positively identify appellant as the shooter; however his identification was made out of court, and he proved to be a very reluctant witness at trial. He testified that appellant was an old friend of his, though he knew him only by his nickname, Expo.

Rodriguez acted as a DJ at the party on September 25. After the shooting occurred, he was among the witnesses detained at the scene by the police. At that time, Rodriguez told the police he had seen nothing.

On December 14, 2004, Rodriguez was contacted by the police again as part of their investigation of the shootings. He was taken to the police station, where his interview was video-recorded. Rodriguez told detectives that before the shooting, he had taken a break from working as a DJ and walked around the party taking pictures. While he was walking around, he saw "Expo flashing the shit, the heat." A detective clarified that Rodriguez was referring to a gun, which he believed to have been a black .25-caliber firearm. Rodriguez said he returned to the DJ area, and when he heard the first shots, he thought it was balloons popping. He described a fight, with bottles being thrown, and explained, "that's when Expo pulled his crap out, and that's when they started shooting. I

seen the flash." Rodriguez said the victim by the door was shot before the victim by the window. At another point in the same interview, however, he said that he did not see the victim by the window get shot. Rodriguez said appellant exited the room with something in his right hand, near his shirt. The detectives typed up a summary of what Rodriguez told them, and had him initial each paragraph and sign the statement.

The next day, December 15, 2004, the detectives showed Rodriguez a photographic lineup that included appellant's picture. He identified the photograph of appellant as "Expo." He also identified another photograph as "Bones," another member of the Doggy Style party crew whom he had seen with appellant at the time of the shooting.

In March of 2005, Rodriguez identified appellant as the shooter in a live lineup.

Rodriguez was called as a prosecution witness at the preliminary hearing in September 2005. Although he was reluctant to testify, he admitted seeing appellant with a gun at the party. He avoided saying that he had actually seen the shooting, however.

At trial, Rodriguez recanted his identification of appellant as the shooter. He said he had made the identification because the police threatened to arrest him if he did not identify appellant. The prosecution explained Rodriguez's recantation by introducing an out-of-court statement by Rodriguez in which he claimed that he had been threatened with a gun by a member of the Doggy Style party crew.

DISCUSSION

I

Appellant contends the evidence at trial was insufficient to support the jury's finding that he was the perpetrator of the murder of Gary Rivera and that the conviction therefore violated his right to due process under the United States Constitution.

"'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"' . . . . 'In determining whether a reasonable trier of fact could have

found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) "'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt."'" (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

"An essential element of any crime is, of course, that the defendant is the person who committed the offense. Identity as the perpetrator must be proved beyond a reasonable doubt." (*People v. Hogue* (1991) 228 Cal.App.3d 1500, 1505.) The strongest evidence to support the jury's finding that appellant was the perpetrator is the statement Rodriguez made to the police. Because Rodriguez testified inconsistently with this statement at trial, the prior statement was admitted into evidence for the truth of the matter stated. (Evid. Code, § 1235.) The credibility of a witness is a question for the trier of fact, and the reviewing court will not second guess that evaluation unless the testimony is inherently improbable. (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1018 ["To reject the statements given by a witness whom the trial court has found credible, either they must be physically impossible or their falsity must be apparent without resorting to inferences or deductions."].) Rodriguez's identification of appellant as the shooter was contradicted by his in-court testimony, but it is not inherently improbable.

The lighting conditions at the party were dim, however witnesses testified that they could see other people at some distance. At the very least, the room was illuminated by a "helicopter light," a device with rotating multi-colored lights, as well as a couple of colored lights at the DJ station. Some witnesses also thought they remembered light from a hallway being visible in the dance hall. Rodriguez testified that he had known appellant

for a number of years. This increases the likelihood that he could accurately pick appellant out of a crowd, even in poor lighting.

Rodriguez also testified at trial that he was under the influence of alcohol and drugs at the party, from which the jury could have inferred that his identification of appellant as the shooter was suspect. At the preliminary hearing, however, Rodriguez testified that he was not under the influence of alcohol or drugs at the party. This prior testimony was admitted at trial. Which of Rodriguez's statements was true was an issue for the jury to resolve.

The weight of the evidence that appellant was the shooter was largely dependent on the jury's assessment of Rodriguez's credibility. The jury had ample information with which to make this assessment. In addition to observing Rodriguez's demeanor during his trial testimony, the jury also was able to assess his demeanor in the videotaped police interview, where he identified appellant. And although Rodriguez testified at trial that he identified appellant only after police had threatened him, the jury could consider that claim against the fact that Rodriguez had identified appellant on multiple occasions: first in the video-recorded interview, then in a photographic lineup the next day, then in a live lineup some time later. Evidence that Rodriguez had been threatened about testifying by members of the Doggy Style party crew was also admitted, so the jury could weigh that evidence against Rodriguez's claim of police duress when deciding which version of events to credit.

The inconsistency between Rodriguez's out-of-court statements and trial testimony, the lighting at the party, and the possible influence of drugs and alcohol were all presented to the jury. The jury was instructed regarding the evaluation of eyewitness testimony. (CALJIC No. 2.92.) Presumably, the jury took all of these factors into account and decided that Rodriguez's out-of-court statements were the most credible version of events.

Finally, even though Rodriguez was the only person to positively identify appellant as the shooter, Robleto's testimony provided some corroboration. Robleto testified that he believed he had seen the gun flash come from a light-skinned Hispanic

male who was standing next to a male with a shaved head. Rodriguez had identified a male with a shaved head, known as "Bones," as standing next to appellant at the time of the shooting. Although Robleto's description was general enough that it likely matched the characteristics of many of the partygoers, the fact that it also matched the characteristics of appellant and the person standing next to him lends support to Rodriguez's identification.

The jury's finding that appellant was the perpetrator of the murder is supported by substantial evidence.

II

Appellant argues that even if the evidence is sufficient to support the jury's finding that he murdered Rivera, the evidence of premeditation is insufficient to support his conviction for first degree murder.

As we have discussed, in considering a challenge to the sufficiency of the evidence, "'we must "review the entire record, and drawing all reasonable inferences in favor of [the judgment], . . . determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" (*People v. Manriquez* (2005) 37 Cal.4th 547, 576.)

A willful, deliberate, and premeditated killing is murder of the first degree. (§ 189.) "'"In *People v. Anderson* [(1968)] 70 Cal.2d [15,] 26-27, we identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, as later explained in *People v. Pride* (1992) 3 Cal.4th 195, 247: '*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]' Thus, while premeditation and deliberation must result from '"careful thought and weighing of considerations"' [citation], we continue to apply the principle that '[t]he process of premeditation and deliberation does not require any extended period of time.

"The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."""""" (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 577.)

Drawing all reasonable inferences in favor of the verdict, the jury's finding that appellant acted with premeditation is supported by substantial evidence. All of the relevant categories of evidence identified in *People v. Anderson* are present in this case.

The evidence showed that appellant possessed a firearm at the party and was "flashing" it prior to the shooting. From this, the jury could infer that appellant had come to the party armed and contemplated using the weapon if the opportunity arose. Although there was no direct evidence that appellant was responsible for bringing the weapon to the party, the jury could reasonably have concluded that he did so, since Rodriguez saw him pull the gun out and show it off. Since there were security guards performing pat-down searches at the entrance to the party, appellant would have had to conceal the firearm or otherwise evade the security measures, strengthening the inference that he intended to be ready to use lethal force.

As to motive, Rodriguez testified that he saw members of the Doggy Style party crew involved in the fight. There also was testimony that Rivera was not a member of the Doggy Style party crew. Since Rivera was involved in an altercation with appellant's friends, the jury could have inferred that appellant was motivated to intervene to protect the reputation of his party crew.

Finally, the manner of killing is indicative of premeditation. Appellant fired multiple shots in a room crowded with people. Even if he had not been aiming specifically for Rivera, under these circumstances the jury could have been convinced that appellant had resolved to kill someone. Additionally, Jacqueline's testimony that she saw Rivera take a step backwards before the final shot was fired at him indicates that he knew he was in the line of fire. If Rivera had enough time to make that assessment and react, appellant had enough time to reach a decision to kill Rivera. (See *People v. Wells* (1988) 199 Cal.App.3d 535, 540-541 [evidence of premeditation sufficient when

defendant took loaded handgun to dance, announced gang affiliation, and fired three shots into victim].)

The multiple shots fired into Rivera also bolster the inference that his murder was premeditated. Because the bullets from the two nonfatal shots were not recovered, we do not know whether those shots came from the same weapon as the fatal shots. Whatever the origin of the two nonfatal shots, however, they likely rendered Rivera visibly wounded. That appellant fired two more shots into a wounded Rivera indicates a "cold, calculated judgment" to kill.

Although the evidence of premeditation is not overwhelming, it is substantial. The verdict of first degree murder is supported by sufficient evidence.

III

Appellant contends the trial court erred in denying his motion for a new trial on the ground that the guilty verdict was contrary to the evidence.

"'In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it.'" (*People v. Seaton* (2001) 26 Cal.4th 598, 693.) "'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 364.)

Appellant's argument attacks the trial court's finding that a rational juror could find Rodriguez's out-of-court identification of appellant credible. However, as we have explained, the credibility of a witness is a question for the trier of fact. Furthermore, as discussed above, substantial evidence supports the jury's verdict. The trial court did not abuse its discretion in denying appellant's motion for a new trial based on the weight of the evidence.

IV

Appellant contends the trial court committed reversible error by failing to instruct the jury, sua sponte, on the lesser included offense of voluntary manslaughter, under theories of heat of passion and unreasonable self-defense.

"California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence. . . . [T]his includes the obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied." (*People v. Breverman* (1998) 19 Cal.4th 142, 148 -149.) The trial court's obligation to provide sua sponte instructions on lesser included offenses arises when "'the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Barton* (1995) 12 Cal.4th 186, 194-95.) The evidence must be "substantial enough to merit consideration by the jury." (*Id.* at p. 195, fn. 4.)

"Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of the lesser included offense of voluntary manslaughter. (§ 192.) But a defendant who intentionally and unlawfully kills lacks malice only in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'—the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton, supra*, 12 Cal.4th at p. 199.) In order for appellant to show he was entitled to jury instructions on heat of passion or unreasonable self-defense voluntary manslaughter, he must show that there was substantial evidence from which a jury could have found all of the necessary elements of those offenses.

One of the necessary elements of heat-of-passion voluntary manslaughter is provocation. (*People v. Lee* (1999) 20 Cal.4th 47, 59.) The provocation must be caused by the victim, and it must be "sufficiently provocative that it would cause an ordinary

person of average disposition to act rashly or without due deliberation and reflection." (*Ibid*.) Furthermore, the defendant must have been actually provoked, and been acting in the heat of passion when the killing occurred. (*Ibid*.) "Adequate provocation and heat of passion must be affirmatively demonstrated." (*Id*. at p. 60.)

There is no substantial evidence of provocation in the present case. There was no evidence presented of interaction between appellant and the victim, so even if the jury inferred that appellant had become inflamed as a result of the fight, it would be pure speculation that the victim was the source of the provocation. Further, no evidence was presented from which a jury could have concluded that an ordinary person of average disposition would have reacted to the situation with deadly force.

Unreasonable self-defense voluntary manslaughter requires that the defendant have killed the victim in the unreasonable but good faith belief that he had to act in self-defense. (*People v. Barton*, *supra*, 12 Cal.4th at p. 201.) There is no substantial evidence from which a jury could have found that appellant acted in the good faith belief that he had to defend himself. No evidence was presented that appellant felt threatened by Rivera. The only weapon any witness attributed to Rivera was a bottle. Jacqueline testified that Rivera carried a bottle into the fight and then threw it at someone. No evidence was presented that appellant was the person at whom Rivera threw the bottle. Even if appellant was the target, once the bottle was thrown, Rivera was unarmed. This sequence of events is not enough to support a finding that appellant acted in good faith to defend himself. The obligation to instruct sua sponte on unreasonable self defense does not arise when the evidence is "'minimal and insubstantial.'" (*Ibid*.)

The trial court did not err in not instructing the jury on heat of passion or unreasonable self-defense voluntary manslaughter. Because there was not substantial evidence to warrant these instructions, we need not consider whether prejudice resulted from the failure to so instruct.

V

Appellant contends the trial court erred by allowing the prosecutor to introduce evidence that witness Rodriguez had been threatened by members of the Doggy Style party crew.

When there is no evidence that the defendant authorized threats against a witness made by a third party, evidence of those threats may not be introduced to prove consciousness of guilt on the part of the defendant. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) In this case, however, the threats against Rodriguez were admitted for the limited purpose of evaluating Rodriguez's credibility. The jury was explicitly instructed not to consider the threats for any other purpose. "'Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible.' ([Citation]; see Evid. Code, § 780, subd. (f) [jury may consider the existence or nonexistence of a bias, interest, or other motive in determining a witness's credibility].) . . . For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1141-1142.)

Even if otherwise admissible, evidence of a threat by the defendant's associates may be excluded if the trial court determines that "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." (Evid. Code, § 352.) There was considerable probative value in evidence regarding threats against Rodriguez. Rodriguez's credibility was one of the most hotly contested issues at trial. His pretrial statements that he had seen appellant firing a gun during the fight at the party were critical to the case against appellant. At trial, however, Rodriguez recanted, and claimed that he had made the statements implicating appellant under duress by the police. For the jurors to evaluate Rodriguez's credibility, they were entitled to hear both of the explanations he gave for his inconsistent testimony: the story that he had been threatened by police and the story that he had been threatened by the Doggy Style party crew. (See *People v. Olguin, supra,* 31 Cal.App.4th

at p. 1369.) Furthermore, any potential prejudice to appellant from this evidence was met by the limiting instruction, which we presume the jury understood and followed. (*People v. Panah* (2005) 35 Cal.4th 395, 492.)

The trial court did not abuse its discretion in admitting evidence about third party threats against Rodriguez.

VI

Appellant challenges the trial court's decision to admit a videotape of the party, made shortly before the shootings, on two grounds: lack of authentication and inaccurate representation of the lighting at the party. The video camera was handed to a police officer after the shootings occurred, but the person who gave the officer the video disappeared before being identified. The video appeared to depict the party shortly before the shootings occurred. It did not capture the shootings and did not depict appellant, but it did capture witness Rodriguez walking around the party. The court decided the video was relevant because it showed Rodriguez was at the party and it captured "the mood, spirit, [and] number of people at the party."

Appellant argues that the videotape was not properly authenticated because the person who made it was not identified and did not testify that the contents of the tape accurately depicted the party. (See Evid. Code, §§ 250 [defining "Writing" to include recording], 1401 [requiring authentication of "writing"].) "A video recording is authenticated by testimony or other evidence 'that it accurately depicts what it purports to show.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 747.) Contrary to appellant's position, the videotape was authenticated by the testimony of multiple witnesses at trial. Both Rodriguez and Santiago Medina testified that the lighting in the video was an accurate representation of the lighting at the party. It is not necessary that the videotape be authenticated by the person who recorded it. (See *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440, fn. 5 ["'[I]t is well settled that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is legally sufficient foundation for its admission into evidence.'"].)

Appellant further argues that the prosecution artificially enhanced the video recording with a "helicopter light," which had the potential to mislead the jury about lighting conditions at the party. Appellant's argument confuses two different issues: the demonstration with the helicopter light and the light source on the video camera.

With the court's permission, the prosecutor performed a demonstration with a rented helicopter light, similar to the light source at the party. The prosecutor turned off all of the lights in the courtroom, except for the helicopter light, so that the jurors could see how much light it produced. After performing this demonstration, the prosecutor returned the rented light to the rental agency, without getting permission to do so from the court. As a result, the court reconsidered its ruling allowing the demonstration of the light. The court decided the jurors might be misled, since the lighting conditions in the courtroom could not replicate those at the party, and the court felt it was unfair to the defense that the prosecutor unexpectedly returned the rented light. The court admonished the jury to disregard the demonstration of the helicopter light.

Although appellant's brief implies that the helicopter light was used to enhance the videotape, our review of the record shows that is not the case. There is no indication in the record that any party altered or enhanced the videotape of the party in any way. Instead, the dispute that arose over the lighting of the videotape had to do with the equipment used to record the tape. Apparently, the video camera that made the recording was equipped with a spotlight that illuminated the area being recorded. Appellant's trial counsel argued that the video would mislead the jury about the amount of light at the party, because the spotlight illuminating the recorded area would give the false impression that the entire room was equally illuminated. The trial court admitted the videotape over this objection. During questioning of witnesses at trial, the attorneys elicited testimony that the video accurately depicted the amount of light during the party.

Appellant's argument that the trial court abused its discretion, resulting in prejudice, is based on a faulty premise, because he erroneously assumes that the video was artificially enhanced by the prosecution with a helicopter light. The helicopter light demonstration was excluded, so we are left only with the question of whether the video

recording of the party should have been excluded. "'We reverse decisions to admit or exclude such evidence only when the trial court has clearly abused its discretion.'" (*People v. Pedroza* (2007) 147 Cal.App.4th 784, 795.) The trial court concluded that the jury would not be misled by the video recording, because the conditions it showed were substantially similar to those experienced by the partygoers. This conclusion was supported by the testimony of witnesses who stated that the video did not appear brighter than the party. We find no abuse of discretion in the admission of the videotape.

VII

Appellant asserts the trial court committed reversible error by refusing to grant a new trial on the ground of juror misconduct or hold an evidentiary hearing on that issue. Appellant's claim of juror misconduct is based on affidavits from three jurors, which he claims show that they engaged in three instances of misconduct: disregarding the trial court's admonishment not to consider the helicopter light demonstration, ignoring the limiting instruction regarding the threats against Rodriguez, and commenting on the defendant's failure to testify.

One of these contentions is easily disposed of. As we have explained, the helicopter light demonstration and the video recording were two different issues. None of the affidavits mention the helicopter light. Instead, all three affidavits state that the jurors considered the lighting in the video recording. Since the video was in evidence and the jurors had not been instructed to disregard the video, this does not show any impropriety.

As to the other two contentions of juror misconduct, we review the trial court's denial of a new trial for abuse of discretion. (*People v. Perez* (1992) 4 Cal.App.4th 893, 906.) "When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible. (See Evid. Code, § 1150, subd. (a).) If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial." (*Ibid.*)

The trial court determined that the affidavits supporting appellant's motion for a new trial were inadmissible as verbal reflections of the jurors' mental processes. "'[J]urors may testify to "overt acts"—that is, such statements, conduct, conditions, or events as are "open to sight, hearing, and the other senses and thus subject to corroboration"—but may not testify to "the subjective reasoning processes of the individual juror."'" (*People v. Perez, supra*, 4 Cal.App.4th at p. 907.)

The statement regarding threats against Rodriguez falls within the prohibition against testimony regarding the subjective reasoning process of a juror. The one affidavit that mentions the threats says, "I, along with the other jurors stated that there was some truth that the defendant, Arturo Jimenez sent his friends to threaten the witness, Eric Rodriguez." As the trial court pointed out in its ruling on the motion, it was proper for the jury to consider threats against Rodriguez with regard to his credibility. Although it was not appropriate for a juror to attribute the threat to appellant in the absence of evidence that he authorized the threat, the statement that a juror did so is an inadmissible statement of the juror's reasoning process. There is no indication that the jurors decided to disregard the limiting instruction regarding the threats or that they considered the threats for any purpose other than assessing the credibility of Rodriguez's testimony. (Cf. *People v. Perez, supra*, 4 Cal.App.4th at p. 908 ["[E]vidence of a jury's explicit or implicit agreement to violate a court's instruction does not touch upon the juror's subjective reasoning processes, since . . . such agreement in and of itself constitutes misconduct."].)

The final alleged instance of misconduct is based on a juror's affidavit stating that this juror, "along with some of the jurors stated that we believed Eric Rodriguez because the muzzle flashes came from an area where only one other guy besides Mr. Jimenez was standing at the time, and that Jimenez did not testify that it was the other guy that was the shooter." The jurors were expressly instructed not to discuss the fact that the defendant did not testify. If the jurors discussed the defendant's failure to testify, such a discussion would be an overt act and testimony regarding that act would be admissible. (*People v. Hord* (1993) 15 Cal.App.4th 711, 725.) It is not clear that such a discussion occurred in

this case, however. The discussion appears to have focused on the credibility of Rodriguez's testimony regarding the muzzle flashes. To the extent that appellant's failure to testify was considered, it seems to have been a factor that the juror considered when weighing Rodriguez's credibility. Furthermore, it is unclear from this affidavit whether any other jurors discussed appellant's failure to testify, or whether this was something that only the affiant considered during the discussion of the muzzle flashes. This is the type of subjective reasoning process that is insulated from review.

Even if we were to assume that the statement regarding appellant's failure to testify was admissible, and therefore evidence of misconduct, appellant would not be entitled to a new trial unless such misconduct was prejudicial. "Although misconduct raises the presumption of prejudice 'the presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.'" (*People v. Hord*, *supra*, 15 Cal.App.4th at p. 725.) Here, there appears to have been, at most, passing reference to appellant's failure to testify. There is no indication of open discussion among the jurors evidencing a refusal to follow the court's instructions. Under similar circumstances, courts have found that there was no substantial likelihood of actual harm. (See, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1425; *People v. Hord*, *supra*, 15 Cal.App.4th at pp. 727-728.)

The trial court did not err in denying appellant's motion for a new trial on the ground of juror misconduct. Additionally, since the decision whether to hold an evidentiary hearing is within the discretion of the trial court (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415), we find no abuse of discretion in the denial of a hearing under these circumstances.

VIII

Appellant contends that the mandatory sentence enhancement of 25 years to life for use of a firearm under section 12022.53[3] constitutes cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution, and article I, section 17 of the California Constitution. Appellant argues the enhancement is disproportionate to the lesser enhancement given for use of other deadly weapons and to the severity of the firearm use enhancements of most other states.

Appellant acknowledges that a number of appellate decisions have upheld the constitutionality of the firearm enhancement against similar challenges. Because we are not bound by the decisions of other districts or divisions, appellant asks that we reexamine this question.

The constitutionality of the firearm enhancement was upheld by this court in *People v. Gonzales* (2001) 87 Cal.App.4th 1. We conclude the reasoning of that decision remains sound. As to the argument that the firearm enhancement is disproportionate to other weapons enhancements, we said: "'[T]he Legislature determined in enacting section 12022.53 that the use of firearms in the commission of the designated felonies is such a danger that, "substantially longer prison sentences must be imposed . . . in order to protect our citizens and to deter violent crime." The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives.'" (*People v. Gonzales, supra*, 87 Cal.App.4th at p. 18.)

With regard to the argument that the California firearm enhancement is disproportionate to the sentencing schemes in other states, we explained: "'That

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[3] The statute reads, in relevant part, "Notwithstanding any other provision of law, any person who, in the commission of [certain specified felonies, including murder], personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d).)

California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide." [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct. [¶] "[T]he needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state. . . . [¶] Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalty is not an exact science but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will. In some cases, leeway for experimentation may be permissible. Thus, the judiciary should not interfere in the process unless a statute prescribes a penalty '"out of all proportion to the offense."'"'" (*People v. Gonzales*, *supra*, 87 Cal.App.4th at p. 18.)

Appellant's argument regarding the constitutionality of the sentencing scheme is limited to a facial challenge. He does not argue that the sentence imposed was unconstitutionally disproportionate as applied to his offense. We conclude that the mandatory sentence enhancement of 25 years to life under section 12022.53, subdivision (d), does not, on its face, constitute cruel or unusual punishment.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.